Supreme Court, U.S.
FILED
952012 JUN 13 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

MARGARET B. FENT and JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY;
OKLAHOMA CORPORATION COMMISSION
and STATE OF OKLAHOMA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

*JAMES M. LITTLE
LITTLE & MORGAN
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

RUSSELL B. FISTER
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543

**Counsel of Record*
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

QUESTIONS PRESENTED

I. Whether a state public utility commission may transfer a property interest to the utility's consumers without obtaining personam jurisdiction over consumers through minimum procedural due process notice?

II. Whether the Petitioners' property interest in their home was violated when the Oklahoma Corporation Commission approved the passing, relinquishing and precluding of Southwestern Bell Telephone Company's property interest in "inside wiring" to its customers without due process of law and just compensation?

III. Whether the property interests of over 92 million homes are affected by the deregulation and detariffing proceedings of governmental utility authorities in the 50 States by the forced transfer of local telephone company's "inside wiring" property interests to their customers without due process and just compensation is sufficient reason to grant this Writ of Certiorari?

PARTIES TO THE PROCEEDING BELOW

The caption of the case includes the names of all parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

A. Factual Background (AT&T's installation of telephone inside wiring embedded in homes througnout the United States) 4

B. Breakup of AT&T (only affecting property interests of parties present in the case) 5

C. Federal Communications Commission Order (requiring all regional telephone companies to deregulate their inside wiring) 6

D. First Oklahoma Corporation Commission Order (requiring Southwestern Bell Telephone Company to amortize its inside wiring and the passing of its property interests to the customers in Oklahoma) 10

E. Proceedings Below - Second Oklahoma Corporation Commission Order (being this appeal from the denial of a jurisdictional attack on the First Order passing property interests of inside wiring without due process of laws and just compensation) 12

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 15

PROPOSITION I
THE FORCED GOVERNMENTAL TRANSFER OF ELEMENTS IN THE PROPERTY INTEREST OF SWB'S INSIDE WIRING TO CUSTOMERS VIOLATED DUE PROCESS 15

PROPOSITION II
NUMEROUS PROCEEDINGS IN OTHER STATES INVOLVING PARTIAL TRANSFERS OF INSIDE WIRING PROPERTY INTEREST IN VIOLATION OF THE 5TH AMENDMENT ESTABLISH THAT THIS COURT SHOULD REVIEW THIS CASE BY GRANTING A WRIT OF CERTIORARI 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441 (D.C. Cir. 1994) 17

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971) 15

Davis v. Southern Bell Tel. & Tel. Co., 755 F. Supp. 1532 (S.D. Fla. 1991) 18

Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972) 15

Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975) 15

Groppi v. Leslie, 404 U.S. 496, 92 S. Ct. 582, 30 L.Ed.2d 632 (1972) 15

Kaiser Aetna v. United States, 444 U.S. 164, 176, 62 L.Ed.2d 332, 100 S. Ct. 383 (1979) 16

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982) 16

Matter of Estate of Pope, Tulsa Professional Collection Services v. Pope, 733 P.2d 396 (Okla. 1986) rev'd 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988) on remand 808 P.2d 640 (Okla. 1990) 15

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) 15

National Ass'n of Reg. Utility Com'rs v. F.C.C., 880 F.2d 422, 425 (D.C. Cir. 1989) 5

Nollan v. California Coastal Comm'n, 483 U.S. 825, 831, 97 L.Ed.2d 677, 107 S. Ct. 3141 (1987) 16

TABLE OF AUTHORITIES – Continued

Page

Re Detariffing of Inside Wire, 79 PUR4th 407 (Penn. 1986) 18

Re Deregulation or Detariffing of Inside Wiring, 79 PUR4th 401 (S.C. 1986) 18

Re Inside Wiring, 142 PUR4th 234 (Al. 1993) 17

Re Interconnection of Customer-owned Equipment to Statewide Telecommunications Network, 32 PUR4th 457 (NY 1980) 18

Re Southern New England Telephone Company, 84 PUR4th 219 (Conn. 1987) 18

Re Southwestern Bell Tel. Co., 74 PUR4th 624, 681-682 (Okl. 1986) 10, 18

Re Southwestern Bell Telephone Company, 137 PUR4th 63, 114 (Okl. 1992) 12

Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417 (D.N.M. 1988); 706 F. Supp. 776 (D.N.M. 1989) 19

Turpen v. Oklahoma Corp. Com'n, 769 P.2d 1309 (Okl. 1988) 11

United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.C. 1982) affm 103 S. Ct. 1240..... 5

STATUTES

28 U.S.C. § 1257 and Rule 13.1 of the Rules of this Court 1

47 U.S.C. § 201, et. seq. (1988)..... 17

Okla. Stat. tit. 60, § 1 (West 1991).....4, 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

Fifth Amendment to the Constitution of the United States 2

Fourteenth Amendment to the Constitution of the United States 2

Article 9, Section 18-20 Oklahoma Constitution 2, 10

MISCELLANEOUS

Detariffing the Installation and Maintenance of Inside Wiring, 51 Fed. Reg. 8498 (Mar. 12, 1986) 6

Federal Communications Commission Record; FCC 86-513, page 1190; CC Docket 79-105; *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring* 7

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review the decision of March 20, 1996, of the Supreme Court of Oklahoma and its Court of Appeals of the State of Oklahoma, Division No. 2, opinion.

OPINIONS BELOW

The Order denying Petitioners' Petition for Writ of Certiorari filed in the Supreme Court of the State of Oklahoma and directed to the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the Appendix to this Petition at B1. The opinion of the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the Appendix to this Petition at A1. The opinion of the Corporation Commission of the State of Oklahoma, is reprinted in the Appendix to this Petition at C1.

JURISDICTION

The Order of the Supreme Court of the State of Oklahoma, being the state court of last resort in civil cases, denied a Writ of Certiorari on March 20, 1996. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257 and Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment to the Constitution of the United States provides:

Amendment V.

> "No person shall be * * * , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Fourteenth Amendment to the Constitution of the United States provides:

Amendment XIV.

> "SECTION 1. * * * . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Constitution of the State of Oklahoma, Article 9, § 18

> § 18. Powers and duties-Notice before taking action-Process for witnesses-Authority of legislature-Municipal powers
>
> The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, * * * . Before the Commission shall prescribe or fix any rate,

charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule regulation, or requirement, shal. first be given, by the Commission, *at least ten days' notice of the time and place,* when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement *shall first be published one time in substance in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located,* together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed general order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified. The authority of the Commission (subject to review on appeal as hereinafter provided) * * * ." (Emphasis supplied.)

4. Okla. Stat. tit. 60, § 1 (West 1991) provides:

> § 1. Definition of property
>
> "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this chapter the thing of which there may be ownership is called property."

STATEMENT OF THE CASE

A. Factual Background (AT&T's installation of telephone inside wiring embedded in homes throughout the United States)

For over a century, the monopoly called the Bell System maintained complete ownership of and responsibility for all telephone equipment, including the users' (customers) telephones. Thus, the customers premises equipment ("CPE"), "simple inside wiring" or "inside wiring" that was embedded in customers floors, walls and basements was owned by the Bell System monopoly. This "contractual" adhesion consent of physical access into customers' homes was necessary in order to receive the monopoly's telephone service.

By the year 1987, over 92.5 percent of all United States' households had telephone service and inside wiring embedded into these homes. See Appendix E1 showing percentage of households with telephone service by each State.

Later, in *National Ass'n of Reg. Utility Com'rs v. F.C.C.*, 880 F.2d 422, 425 (D.C. Cir. 1989) a federal court confirmed these facts by stating:

> "*Originally, all wiring from* the telephone company's central switching facilities *to* the customer's telephone ("customer premises equipment" or "CPE") was *owned*, installed, and maintained by the company * * * ." (Emphasis supplied.)

The telephone companies maintained their "inside wiring" assets by general corporate funds pursuant to general rate levies on all commercial and residential customers.

B. Breakup of AT&T (only affecting property interests of parties present in the case)

In the year 1982 (after years of litigation), a U.S. District Court ordered the divestiture of the monopoly American Telephone and Telegraph Company ("AT&T") in the case of *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.C. 1982) affm 103 S. Ct. 1240.

On page 201 of the AT&T case, Section A. *Compensation and Transfer of Assets*, the court cautioned about the impairment of third party property interests during the divestiture transfer of assets to the regional Bells when it noted in footnote 295 that:

> " * * * . Apparently the only limitation on these rules is that a transfer may not impair the rights of interested third parties, such as creditors, See, e.g., *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12, 92

S.Ct. 165, 168, 30 L.Ed.2d 128 (1971); *Pepper v. Litton*, 308 U.S. 295, 307, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939); * * * ."

Thereafter, deregulation and detariffing of all the telephone companies was the policy of all governmental authorities.

C. Federal Communications Commission ("FCC") Order (requiring local telephone companies to deregulate their inside wiring)

Later, the FCC established a "demarcation point" located at a "box" attached to the outside wall of all American homes that would determine the end of the telephone companys' wiring and the beginning of the customers' inside wiring. The ending of the use of the telephone company's general funds to maintain the "inside wiring" would be called deregulating or detariffing and would cause each customer to financially maintain the inside wiring embedded in their homes. The government was about to change the "contractual" consent terms between two private parties.

The telephone companies sought the government's help in wanting to get out of the inside wiring property interests because of the old, brittle, decaying wiring, the new fiber optics technology, new wireless communications industry, the new cable TV industry and the new home computer industry.

In *Detariffing the Installation and Maintenance of Inside Wiring*, 51 Fed. Reg. 8498 (Mar. 12, 1986) (called Second Report and Order) the FCC required the, "relinquishment of expensed inside wiring by January 1, 1987, *and* of

capitalized inside wiring by the end of the amortization period for the costs of that wiring."

In Federal Communications Commission ("FCC") Record; FCC 86-513, page 1190; CC Docket 79-105; *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*; MEMORANDUM OPINION AND ORDER; Adopted: November 13, 1986; Released: November 21, 1986; the telephone companies were threatening an eminent domain "taking" of telephone company's property by the FCC without just compensation for the forced transfer of "simple inside wiring" to customers when the record states:

> "28. NATA's and GTE's support for mandatory relinquishment is based on their belief that it is not necessary for this Commission to reach any eminent domain questions to sustain that action. Those parties assert that under the principles established in *Democratic Central Committee*, there can be no "taking" of telephone company property *when*, as NATA asserts is the case with regard to *inside wiring, ratepayers rather than investors* have borne the risk of loss associated with *telephone company property*. NATA and GTE assert that since telephone companies will *not* have to *relinquish ownership* of any inside wiring *until* after it has been fully amortized or expensed, *the companies will have been fully compensated for their investment in that wiring*. In GTE's view, mandatory relinquishment should be considered to be a regulation, not a taking, of telephone company property absent a showing that the fully compensated investor bore the risk of loss associated with inside wiring." (Emphasis supplied.) *FCC 86-513*, page 1195.

Therefore, the stockholders of all the telephone companies were fully compensated for their value in the inside wiring before being dumped upon the customers.

The ORDERING CLAUSES for FCC 86-513, pages 1195, 1196 states:

"VI. *ORDERING CLAUSES*

* * * . 43. IT IS FURTHER ORDERED, that the telephone companies shall comply with the prohibitions described in paragraph 35 of this Order."

and, paragraph 35 states:

"35. Customers' ability to obtain inside wiring installation and maintenance from sources of their own choosing could be inhibited *if a telephone company were to use a claim of ownership* as basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. *Therefore, we will preclude telephone companies from imposing such restrictions* with respect to inside wiring that has ever been installed or maintained under tariff. Ratepayer rights would also be abridged if telephone companies were to receive additional compensation for such wiring after it has been expensed or fully amortized. Therefore, we will preclude the telephone companies from requiring that such wiring be purchased and from imposing a charge for the use of such wiring. Telephone companies *may, of course, collect wiring maintenance fees* on an untariffed basis from anyone who chooses to use that service, provided the companies use the accounts provided for unregulated activities. * * * ." (Emphasis supplied.)

The FCC's deregulation or detariff of inside wiring was ordered with the FCC determining the ex parte contractual terms between the telephone companies and its customers:

1. The FCC required all telephone companies to "relinquish" all claims to ownership of inside wiring. In a two party dispute, i.e., Bell and customers, that means when Bell "relinquishes" ownership interests the other party (customers) receives the ownership interests.

2. The FCC "precluded" all telephone companies from using claims of ownership against its customers on inside wiring. In a two party dispute, i.e., Bell and customers, that means when Bell is "precluded" as to ownership claims the other party (customer) is given the ownership interests.

Therefore, if any interest in the inside wiring *was* transferred to the customer, the governmental forced transfer required the customer to receive a property interest and to personally (financially) maintain it. If any interest in inside wiring was *not* transferred, the governmental act forced the customer to personally (financially) maintain property owned by a telephone company. A customers' home is a property interest and creates standing. We know of no customer given personal notice of these FCC proceedings. So much for due process and just compensation in America.

D. First Oklahoma Corporation Commission Order (requiring Southwestern Bell Telephone to amortize its inside wiring and the passing of its property interests to the customers in Oklahoma.)

The Oklahoma Corporation Commission ("OCC") is a special tribunal established pursuant to the Constitution of the State of Oklahoma, Article 9, Section 18-20 with powers to regulate rates and service of public utilities such as the telephone company, Southwestern Bell Telephone Company ("SWB").

After the 1982 divestiture, SWB filed an Application in OCC General Cause No. 29321 for approval of interim rate increases previously granted since the AT&T breakup and for permanent future rate increases involving hundreds of millions of dollars. The notice as shown in APPENDIX B gave no indication of any changes in the property interests of "inside wiring" or the customers' homes.

On January 29, 1986, OCC adopted Order No. 292337 in OCC General Cause No. 29321 which is reported in the public utility reporter as *Re Southwestern Bell Telephone Company*, 74 PUR4th 624, 681 (Okl. 1986) and requires the "passing of ownership" of SWB's inside wiring to its customers after SWB amortization of the wiring.

> " * * * . Mr. Buckalew recommends that the commission adopt applicant's optional wire maintenance plan and to remove its cost from the general body of ratepayers. Dr. Fish also supports the plan, *but recommends that it be implemented only after amortization of applicant's*

inside wiring and passing of ownership to its customers. The commission agrees with and adopts Dr. Fish's recommendation." (Emphasis supplied.)

Headnote No. 11 designated by this national public utility citation states for Order No. 292337:

> "An optional wire maintenance plan was approved whereby a dominant local exchange telephone carrier would maintain premises wire jacks for a monthly fee; the plan is to be implemented *only after the telephone carrier had amortized its inside wiring and passing ownership of the wiring to its customers."* (Emphasis supplied.)

The forced governmental passing of a property interest of SWB's inside wiring to the Petitioners and approximately One Million Oklahoma households violated due process and was a taking of customers private property rights without just compensation.

Thereafter, the State of Oklahoma (the Attorney General's office) filed two rate appeals of OCC Order No. 292337. SWB and the OCC were parties to these appeals. None of these three parties (all being Respondents to this Writ) objected to the part of the OCC Order that required the "passing of ownership" of SWB's inside wiring. Res judicata and collateral estoppel now attach to STATE, SWB and OCC as to the "merits" for the passing of ownership.

OCC Order No. 292337 (General Cause No. 29321) was affirmed in part and reversed in part in *Turpen v. Oklahoma Corp. Com'n,* 769 P.2d 1309 (Okl. 1988).

A later rate case OCC Order No. 367868 (dated August 26, 1992) in OCC Cause No. PUD 000662 confirmed that amortization of SWB's inside wiring was completed on December 31, 1990, thus passing a property interest to the customers as shown in the public utility reporter as *Re Southwestern Bell Telephone Company*, 137 PUR4th 63, 114 (Okl. 1992) that states:

> *"Line 40-End of Inside Wire Amortization*
>
> Staff, the AG and SWBT agreed that the completion of the inside wire amortization on December 31, 1990, created the need for an adjustment to SWBT's test year revenues, expenses and rate base. The ALJ agreed and found SWBT's pro forma adjustment was reasonable and was based upon substantial evidence."

Therefore, all of SWB's value was amortized off its books as to its inside wiring and the passing of a property interest was completed on December 31, 1990.

E. Proceedings below – Second Oklahoma Corporation Commission Order (being this appeal from the denial of a jurisdictional attack on the passing of property interests of inside wiring without due process of law and just compensation.)

Only after the Petitioners inquired with SWB about its INLINE and INLINE PLUS inside telephone wire repair service as shown in SWB's telephone books did these customers find out that the OCC, STATE and SWB were all parties to a transfer of SWB's property interest to inside wiring to its customers. The Petitioners by not being parties to the first OCC proceeding (General Cause

No. 29321), can attack its validity as to jurisdictional matters even after its final judgment.

Petitioners are required to exhaust their administrative remedies in this State utility commission (OCC) before filing a damage action in the State or Federal District Court. Also, the OCC lacks jurisdiction to award money damages for tort or constitutional violations.

On January 26, 1994, Petitioners filed an Application in the OCC attacking OCC Order No. 292337 (OCC General Cause No. 29321) for lack of personal, subject matter and power jurisdiction. The filing of the Application is how the federal questions were first raised under U.S. Supreme Court Rule 14(h). Since the "passing of ownership" paragraph was "hidden" within the OCC's rate Order No. 292337, the Petitioners were required to attack the rate order as void.

The personal jurisdiction attack (due process) was due to the fact that OCC's authority for notice of its proceedings was a publication notice as shown by APPENDIX D1.

Petitioners' subject matter and power jurisdiction attack is partially based upon the facts that Okla. Stat. Tit. 60, § 1 (West 1991) defines property in Oklahoma as a thing in which a person "possess and use it to the exclusion of others." Both Petitioners' home and SWB's inside wiring are property by this statute and creates standing. The 5th and 14th Amendments would prohibit the OCC from exercising subject matter or power jurisdiction to change, shift, transfer, realign, preclude or relinquish the property interest of the inside wiring to any of the homes

by elements of repair, maintenance, financial liability or relocation costs to be required by the home owner.

On December 9, 1994, the OCC dismissed the Petitioners' Application with prejudice. An appeal was filed with the Supreme Court of the State of Oklahoma that thereafter assigned the case to the Court of Appeals, Division 2, State of Oklahoma for an opinion.

The Court of Appeals in Oklahoma is not a traditionally intermediate appellant court. The Oklahoma Supreme Court can assign cases for opinions in the Court of Appeals and later the mandates are approved and only issued by Oklahoma's Supreme Court.

On October 17, 1995, the Court of Appeals, Division 2, State of Oklahoma, AFFIRMED the OCC dismissal. This Court of Appeals spent more time defending the SWB's rate increase than discussing the due process or taking violation.

On March 20, 1996, the Oklahoma Supreme Court denied a review of its Court of Appeals opinion with a dissenting opinion on the question of:

> "I would issue a writ of certiorari to address the important questions of whether the Oklahoma Corporation Commission has subject-matter jurisdiction in a rate-making proceeding to transfer property rights between a public utility and its consumers and whether the Oklahoma Corporation Commission may transfer property rights to the utility's consumers without obtaining in personam jurisdiction over the consumers through minimum procedural due process notice."

REASONS FOR GRANTING THE WRIT

PROPOSITION I

THE FORCED GOVERNMENTAL TRANSFER OF ELEMENTS IN THE PROPERTY INTEREST OF SWB'S INSIDE WIRING TO CUSTOMERS VIOLATED DUE PROCESS.

The notice of a rate change published in the first OCC proceeding, General Cause No. 29321, gave no indication that property interests in the "inside wiring" or customers' homes would be affected. Even if the notice was mailed to each customer, it was constitutionally defective for the future action taken by the OCC. See APPENDIX D1.

Due process requires that any element of a property interest may not be deprived of persons unless preceded by sufficient notice apprising a person as to the nature of the action being taken and an opportunity to appear at the hearing. See *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972); *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975); *Groppi v. Leslie*, 404 U.S. 496, 92 S. Ct. 582, 30 L.Ed.2d 632 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) (a New York statute authorizing only publication notice to known beneficiaries of petitions by trust companies to settle trust accounts is violation of due process where a beneficiaries' claim against a trust account is a property interest requiring personal service by notice), and *Matter of Estate of Pope, Tulsa Professional Collection Services v. Pope*, 733 P.2d 396 (Okla. 1986) rev'd 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988) on remand 808 P.2d 640

(Okla. 1990) (an Oklahoma statute authorizing only publication notice to known creditor's for claims against an estate is violation of due process where a creditor's claim is a property interest requiring personal service by notice.)

A property interest in inside wiring is comprised of a bundle of rights making up the property. Some of the elements of the inside wiring property interest being transferred by OCC are:

1. In the past, all costs of inside wiring was located in the general rate base for all subscribers.
2. In the future, all costs of SWB's inside wiring will be done by each individual customer.
3. FCC and OCC precludes all telephone companies from using a claim of ownership as a basis for restricting the customers' removal, replacement, rearrangement or maintenance of inside wiring.
4. FCC and OCC precludes all telephone companies from requiring the purchase of inside wiring and from imposing a charge for the use of inside wiring.
5. FCC and OCC approves a customers' ability to obtain inside wiring installation and maintenance from sources other than their present telephone.

The cases of *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L.Ed.2d 332, 100 S. Ct. 383 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 73 L.Ed.2d 868, 102 S, Ct. 3164 (1982) and *Nollan v. California*

Coastal Comm'n, 483 U.S. 825, 831, 97 L.Ed.2d 677, 107 S. Ct. 3141 (1987) recognize that a property interest involves a "bundle of rights" and each of these essential sticks are protected by the 5th Amendment. A governmental transfer without a provision for just compensation violates the 5th Amendment.

The very recent case of *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994) holds that the FCC lacks authority under the Communications Act of 1934, 47 U.S.C. § 201, et seq. (1988) to require local telephone companies to permit physical co-location of equipment upon demand. This case further stated that the FCC's decision to grant the right to use another's property directly implicates the Just Compensation Clause of the Fifth Amendment.

PROPOSITION II

NUMEROUS PROCEEDINGS IN ORDER STATES INVOLVING PARTIAL TRANSFERS OF INSIDE WIRING PROPERTY INTERESTS IN VIOLATION OF THE 5TH AMENDMENT ESTABLISH THAT THIS COURT SHOULD REVIEW THIS CASE BY GRANTING A WRIT OF CERTIORARI.

Virtually every State utility commission followed the FCC's recommendations as to detariffing and deregulation of all telephone company's inside wiring. A review of some of these State utility commission decisions are:

ALABAMA – *Re Inside Wiring*, 142 PUR4th 234 (Al. 1993) (detariffing inside wiring of Bell South with customers seeking Bell South contracts or independent contractors for inside wiring maintenance.)

CONNECTICUT – *Re Southern New England Telephone Company,* 84 PUR4th 219 (Comm. 1987) (explaining customers' options and obligations of telephone companies concerning inside wiring maintenance pending final FCC resolution.)

FLORIDA – *Davis v. Southern Bell Tel. & Tel. Co.,* 755 F. Supp. 1532 (S.D. Fla. 1991) (a class action lawsuit alleging Southern Bell offering negative option contracts to its customers for the maintenance of Bell's inside wiring that was deregulated or turned back to customers.)

NEW YORK – *Re Interconnection of Customer-owned Equipment to Statewide Telecommunications Network,* 32 PUR4th 457 (NY 1980) (ordering each telephone company to have a customer ownership of premises wiring program in place.)

OKLAHOMA – *Re Southwestern Bell Telephone Company,* 74 PUR4th 624, 681 (Okla. 1986) aff. in part rev. in part in *Turpin v. Oklahoma Corp. Com'n,* 769 P.2d 1309 (Okl. 1988) (adopting the passing of ownership to SWB's inside wiring to its customers and adopting SWB's optional wire maintenance plan.)

PENNSYLVANIA – *Re Detariffing of Inside Wire,* 79 PUR4th 407 (Penn. 1986) (Detariffing of customer premises inside wiring by transfer to customer ownership when net book value of the asset reaches zero with customers seeking their own maintenance plan in the State of Pennsylvania.)

SOUTH CAROLINA – *Re Deregulation or Detariffing of Inside Wiring,* 79 PUR4th 401 (SC 1986) (relinquishment of the ownership of inside wiring by all telephone utility

companies in South Carolina by calling such plan for deregulation.)

ARIZONA, COLORADO, IDAHO, MONTANA, NEW MEXICO, WYOMING AND UTAH – *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417 (D.N.M. 1988); 706 F. Supp. 776 (D.N.M. 1989) (class action lawsuit against Mountain Bell for telephone customers in Arizona, Colorado, Idaho, Montana, New Mexico, Wyoming and Utah as to an offer to contract for their inside wiring maintenance by a negative option contract method with Mountain Bell rather than going to others to service the inside wire.)

The only parties with the authority to change the status of the property interest in the homes and the inside wiring are the homeowners and the telephone companies. If the telephone companies can negotiate with homeowners with government dictated terms as to property interests, they can do the same without government dictates.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set for a full hearing by the Court. In the alternative, *certiorari* should be granted and the decision below summarily reversed, sending the case back to the Supreme

Court of Oklahoma and its Court of Appeals of the State of Oklahoma, Division No. 2.

Respectfully submitted,

JAMES M. LITTLE, OBA #5465
(Counsel of Record)
LITTLE & MORGAN
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

RUSSELL B. FISTER, OBA #2946
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543

Attorneys for Petitioners

APPENDIX A

IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

MARGARET B. FENT and JERRY R. FENT, wife and husband,	)	
Appellants,	)	No. 84,815
vs.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY; OKLAHOMA CORPORATION COMMISSION; and STATE OF OKLAHOMA,	)	NOT FOR PUBLICATION
Appellees.	)	

APPEAL FROM ORDER OF THE
OKLAHOMA CORPORATION COMMISSION

Jerry R. Fent Russell Fister Oklahoma City, Oklahoma	For Appellant
Roger K. Toppins Oklahoma City, Oklahoma	For Appellee

MEMORANDUM OPINION

(Filed October 17, 1995)

BOUDREAU, J.

Appellants, Margaret B. Fent and Jerry R. Fent, appeal an order of the Oklahoma Corporation Commission (OCC) dismissing their application to vacate the OCC legislative rate Order No. 292337. In this action to void the order and to secure a refund of all associated rate increases, the issue on appeal is whether the OCC correctly dismissed the Fents' application. We hold that it did and affirm.

On January 29, 1986, the OCC issued Order No. 292337 in response to an application filed by Southwestern Bell Telephone Company (SWB) for authority to increase rates for telephone service. The order approved interim rate increases previously granted SWB and provided an increase in prospective rates and charges. Among other things, it also removed the cost of maintaining wiring inside subscribers' homes ("inside wiring") from the existing rate scheme. It then authorized SWB to offer an inside wire maintenance plan to subscribers as an optional service. Finally, the order identified a time at which the service plan would be offered. In this last regard, the order adopted the recommendation of Dr. Thomas Fish that the service plan be implemented only after "amortization of applicant's inside wiring and passing of ownership to its customers." *Re Southwestern Bell Tel. Co.*, 74 P.U.R.4th 624, 681-682 (1986).

The Attorney General of Oklahoma appealed Order No. 292337. The supreme court affirmed in part, reversed

in part, and remanded for further proceedings in *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309 (Okla. 1988). Because the terms of the optional wire maintenance plan were not challenged on appeal, the opinion did not address this plan.

On January 26, 1994, almost eight years after the issuance of Order No. 292337, the Fents filed an application with the OCC challenging the order. In their application, the Fents alleged that the OCC had improperly and unlawfully attempted to transfer the title of "inside wiring" from SWB to SWB's subscribers. They challenged the order on jurisdictional and other constitutional grounds. The Fents requested that the OCC declare Order No. 292337 void and refund all associated rate increases to SWB's customers.

In response to the Fents' application, both SWB and the OCC staff filed motions to dismiss, contending the order never transferred or attempted to transfer title to the wiring inside subscribers' homes. They relied extensively on SWB's "General Exchange Tariff," which provides:

> 7.2C. Ownership – Equipment, and lines on customers' premises, furnished by the Telephone Company, shall be and remain the property of the Telephone Company . . .

They also argued that a review of the FCC and OCC orders relating to the deregulation of the business of inside wire maintenance demonstrated that title to SWB's wiring was never transferred.

The administrative law judge (ALJ) issued a report recommending that the motions to dismiss be sustained.

The ALJ's report found that contrary to the Fents' assertions:

> The OCC never transferred ownership of "simple inside wiring" to any subscriber of SWBT. It simply provided for the ability of the end user to install its own wire, regardless of whether it was a property owner, in the same manner that a property owner may have its own electrical service installed by the repairman of their choice.

Thereafter, the Fents appealed the ALJ's report to the OCC en banc. Following oral argument, the OCC sustained the ALJ's finding and dismissed the Fent's application. The Fents appeal.

Although the OCC found that "inside wiring" was never transferred to any subscribers of SWB, this appeal can be resolved without attempting to reconcile the seemingly inconsistent language existing in several OCC and FCC orders relating to "inside wiring." The Fents have alleged that OCC Order No. 292337 transferred ownership of SWB's "inside wiring" to its subscribers in violation of a myriad of federal and state constitutional provisions. However, even if this court were to agree with the Fents that OCC Order No. 292337 attempted, unconstitutionally, to pass ownership of SWB's "inside wiring" to its subscribers, this finding would not void the entire order or warrant the refund of all associated rate increases. The portion of the order determining permanent rates would be severable and would remain in viable legislative enactment even if the alleged offending portion was constitutionally infirm.

A rate order is legislative in nature. *Turpen*, 769 P.2d at 1317. See also *State ex rel. Cartwright v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983). In *Western Okla. Gas & Fuel Co. v. State*, 113 Okla. 126, 239 P. 588, 591 (1925), the supreme court said:

> . . . in the last analysis an order of the Corporation Commission fixing rates is entitled to the same consideration as if the Legislature had fixed them . . .

In determining whether the unconstitutionality of part of a legislative act will affect the validity of the remaining provisions, we are presented with an issue of law. Contested issues of law are reviewable in all actions, suits, and proceedings by a de novo standard. De novo appellate review on the record requires an independent, nondeferential re-examination of another tribunal's record and findings. *State ex rel. Oklahoma Bar Ass'n v. Livshee*, 870 P.2d 770, 773 (Okla. 1994). See also *Brown v. Burkett*, 755 P.2d 650, 651 (Okla. 1988).

In evaluating the severability of the alleged offending provision, we note that Order No. 292337 does not contain a "severability" or "separability" clause. Title 75 O.S. 1991 § 11a provides a presumption of severability unless we find (1) the non-offending portions are so connected with and dependant upon the unconstitutional portion that we cannot presume the Legislature would have enacted the former without the latter, or (2) that the non-offending portions are incapable of standing alone. Severability of the non-offending provisions thus does not necessarily depend on the presence of the clause. *Ethics Comm'n of State of Okla. v. Cullision*, 850 P.2d 1069, 1077 (Okla. 1993).

Ratemaking is the process that determines the costs which a public utility may recover from its customers. A public utility is entitled to recover its operating expenses and earn a reasonable rate of return. See *Turpen*, 762 P.2d at 1316. The ratemaking process which yielded OCC Order No. 292337 considered a variety of financial factors that touched upon SWB's operating costs, rate base, and the fair rate of return.[1] After considering these financial factors, the OCC derived a level of required revenue for SWB. Each of the financial factors considered by the OCC in the ratemaking process was inseparably with the resultant revenue figure derived.

The Fents allege that OCC Order No. 292337 unlawfully attempted to transfer title of "inside wiring" from SWB to the subscriber. Accordingly, they seek to declare the order void and, concomitantly, seek a refund of all associated rate increases. However, the portion of the order determining permanent rates stands unconnected and independent of the seven words in the order that allegedly transferred title of SWB's "inside wiring." If the order indeed transferred title, the transfer was not a factor applied in the formula used by the OCC to determine the utility's aggregate revenue. The OCC's revenue determination stands alone from the alleged title transfer and remains a viable legislative enactment.

In arguing against severability, the Fents point out that the ALJ found that " '[s]imple inside wiring' is a part of the ratemaking process . . . In the past, the cost of all

---

[1] By way of limited example, the OCC rejected a proposal to increase mileage charges of 50% and disallowed wages and salary increases that would not occur until after the test years.

'simple inside wiring' was located in the rate base." The Fents' argument is disingenuous for two reasons. First, while the decision to remove the cost of maintaining inside wiring from the rate base certainly affected SWB's required revenue, it lowered that level rather than raised it. Secondly, the Fents have never taken issue with the fact that the OCC removed the costs of maintaining "inside wiring" from the rate base; rather, they have complained solely about the alleged transfer of title to the "inside wiring," an issue that has nothing to do with the ratemaking process in this case.

In conclusion, we find that it was unnecessary to address the Fents' allegation that OCC Order No. 292337 was void on jurisdictional or other constitutional grounds. We reach this conclusion because we find that, even if the alleged offending portion was constitutionally infirm, the remainder of the order determining permanent rates would be severable and remain a viable legislative enactment. Accordingly, SWB subscribers would not be entitled to a refund of all associated rate increases.

AFFIRMED.

TAYLOR, P.J., and RIEF, J., concur.

October 17, 1995

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, March 20, 1996

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

(Filed March 20, 1996)

84,815 Margaret B. Fent and Jerry R. Fent, wife and husband v. Southwestern Bell Telephone Company, Oklahoma Corporation Commission and State of Oklahoma.

Certiorari denied.

CONCUR: Kauger, V.C.J., Lavender, Simms, Hargrave, Opala, Summers, Watt, JJ. Wilson, C.J., dissenting to the denial of petition for certiorari.

I would issue a writ of certiorari to address the important questions of whether the Oklahoma Corporation Commission has subject-matter jurisdiction in a rate-making proceeding to transfer property rights between a public utility and its consumers and whether the Oklahoma Corporation Commission may transfer property rights to the utility's consumers without obtaining in personam jurisdiction over the consumers through minimum procedural due process notice.

DISQUALIFIED: Hodges, J.

/s/ *Yvonne Kauger*
YVONNE KAUGER
VICE CHIEF JUSTICE

APPENDIX C

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION: MARGARET B. FENT and JERRY R. FENT, WIFE AND HUSBAND RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 292337, IN CAUSE NO. PUD 29321, (OR ANY OTHER ORDER, REGULATED OR RULE) AS VOID AS TO COMMISSION'S LACK OF JURISDICTION OVER PRIVATE PARTIES, SUBJECT MATTER OR POWER TO TRANSFER OWNERSHIP OF SOUTHWESTERN BELL TELEPHONE COMPANY'S "SIMPLE INSIDE WIRING" TO PRIVATE PARTIES WITHOUT DUE PROCESS, EQUAL PROTECTION OF LAWS AND JUST COMPENSATION	CAUSE NO. PUD 940000292 ORDER NO. 388589

HEARING: Before the Administrative Law Judge, Robert E. Goldfield on February 10, 1994
Before the Commission En Banc on August 17, 1994 to appeal the Report of the Administrative Law Judge, Robert E. Goldfield.

APPEARANCES: Russell Fister and Jerry R. Fent, Attorneys for Margaret B. and Jerry R. Fent
Roger K. Toppins, Robert Gryzmala and Jonathan Royston, Attorneys, Southwestern Bell Telephone Company
Rick Chamberlain, Assistant Attorney General, State of Oklahoma
Deborah Jacobson, Assistant General Counsel, Public Utility Division, Oklahoma Corporation Commission

FINAL ORDER

(Filed December 9, 1994)

BY THE COMMISSION:

The Corporation Commission of the State of Oklahoma being regularly in session and the undersigned Commissioners being present and participating, there comes on for consideration and action an appeal filed on July 29th, 1994, by Margaret B. Fent and Jerry R. Fent (Applicants) to the Report of the Administrative Law Judge (ALJ). The ALJ Report recommend this cause be dismissed with prejudice and was issued on July 21, 1994. The appeal was heard on August 17th, 1994, and the matter was deliberated on September 13, 1994.

PROCEDURAL HISTORY

The Commission issued Order No. 292337 in General Cause No. 29321 on January 29, 1986. The Cause was initiated by an application filed by Southwestern Bell Telephone Company (SWBT) for authority to increase

rates for telephone service in Oklahoma. Among other things, Commission Order No. 292337 established prospective rates and charges for SWBT that provided an annual increase in SWBT's intrastate earnings of $80.06 million. In addition, the order authorized SWBT to implement an optional inside wiring maintenance service to be implemented after the full amortization of the company's investment in its inside wiring account.

The order was appealed to the Oklahoma Supreme Court and is cited as *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309 (Okl. 1988) wherein the Court issued a mandate on April 6, 1989, affirming in part, reversing in part and remanding to the Commission. The provisions of the order pertaining to the inside wiring maintenance service program were affirmed by the Court.

On April 5, 1985, the Federal Communications Commission (FCC) released a Further Notice of Proposed Rulemaking (Further Notice) in CC Docket No. 79-105 proposing to detariff the installation of simple inside wiring and also to detariff the maintenance of all inside wiring. In addition, the FCC proposed that the telephone companies relinquish all claims to ownership of the inside wiring when their investment in the inside wiring account had been fully amortized.

In the FCC's Second Report and Order (Second Report) released on February 24, 1986, it found relinquishment of ownership to be cost effective, reasonable, in the public interest and permissible under the Fifth Amendment. Hence, the FCC required the telephone companies to abandon any claim of ownership in wiring that had been expensed or fully amortized. The FCC did

not, however, attempt to determine ownership of the abandoned wiring.

Several parties filed petitions for reconsideration of the FCC's Second Report and Order. On reconsideration, the FCC issued its Memorandum Opinion and Order on November 21, 1986, (Reconsideration Order) wherein it reversed its relinquishment of ownership requirement and substituted requirements that would protect consumers from possible abuses that might arise from the assertion of claims of ownership by telephone companies. In its Reconsideration Order the FCC found that the assertion of a claim of ownership would not inevitably conflict with the objectives of their decision to deregulate the installation and maintenance of inside wiring, but a claim of ownership could be used to justify conduct that conflicts with those objectives. Therefore, in lieu of its relinquishment of ownership mandate, the FCC precluded telephone companies from using a claim of ownership as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring.

On September 8, 1986, the Commission issued a Notice of Inquiry in response to the FCC's Second Report and Order in CC docket No. 79-105. The Notice of Inquiry, Cause No. PUD 860000238, was initiated to examine the procedures necessary to detariff the installation and maintenance of inside wiring pursuant to the FCC mandate. A technical conference was held on November 4, 1986, and Staff's proposal was presented on November 13, 1986.

On December 23, 1986, the Commission issued Order No. 306994 in Cause No. PUD 860000238. In accordance

with the FCC's Reconsideration Order released November 21, 1986, the Commission precluded telephone companies from using a claim of ownership as a basis for restricting removal, replacement, rearrangement or maintenance of inside wiring and established a demarcation point for prospective maintenance responsibility. Further, the Commission precluded telephone companies from requiring the purchase of inside wiring and from imposing a charge for the use of inside wiring after it had been expensed or fully amortized.

Applicants filed their application on January 26, 1994, alleging that the Commission, in Order No. 292337 in General Cause No. 29321, ordered SWBT to transfer ownership of its inside wiring to private parties without due process, equal protection and just compensation. Applicants filed a Motion for an Emergency Hearing on January 26, 1994. The Commission issued Order No. 380250 in this Cause on February 16, 1994, denying Applicants' Motion for Emergency Hearing. In its order, the Commission agreed with the Administrative Law Judge's (ALJ) finding that Applicants would not be harmed in a manner that would require an emergency hearing rather than through a hurried up emergency hearing process.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds that it had the requisite authority and jurisdiction to issue Order No. 292337 in General Cause No. 29321 pursuant to Art. IX, § 18 of the Oklahoma Constitution, 17 O.S. § 131 *et seq.*, and 18 O.S. § 438.31, and the Commission's Rules and Regulations

Governing and Regulating the Operation of Telephone Companies and Telecommunications in Oklahoma (Telephone Rules).

The Commission further finds that it is without authority to vacate Commission Order No. 292337 issued in General Cause No. 29321, of which Applicants complain, since the order became final and unappealable thirty days after January 29, 1986. In *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309, 1318 (Okl. 1986), the Oklahoma Supreme Court stated that the Commission's orders automatically become final after 30 days and that after such 30-day period, it is beyond the agency's power to vacate such orders.

The Commission further finds that proper notice of General Cause No. 29321 was given. The purpose of General Cause No. 29321 was to establish lawful rates and charges by SWBT which is within the Commission's authority. In addition to establishing rates General Cause No. 29321, the Commission approved a new optional service offering of SWBT. Art. IX, § 18 of the Oklahoma Constitution requires that the Commission give at least ten days' notice of any hearing prescribing any rate or charges against a company and notice by publication in newspapers of general circulation. The Commission further finds that proper notice was published in the Daily Oklahoman and the Tulsa World on November 29, 1984 and on December 6, 1984, prior to the hearing.

The Commission further finds that it has the authority to establish rules regulating the provision of telephone service on private property which impacts telephone company customers. 17 O.S. (1991) § 153. In its exercise of

this authority, the Commission has the authority to approve telecommunications services and set the requirements or provisions of those services whether by tariff, contract or otherwise. Therefore, the Commission finds that it has the authority to deregulate telecommunications services and to remove the cost of inside wiring from the general rate base.

The Commission further finds that the Order of which the Applicants complain, Order No. 292337 issued on January 29, 1986, in Cause No. PUD 29321, does not transfer ownership of property to private parties as Applicants alleged. This Order, No. 292337 was issued in a general rate review of the rates and charges of SWBT. Order No. 292337, among other things, set rates and approved an optional inside wiring maintenance service. Therefore, vacating this Order would not reverse the alleged transfer of property. The Commission further finds that no transfer of property occurred in any other action by the Commission or the FCC involving the detariffing of inside wiring.

The Commission further finds that the Commission's hearing on SWBT's application in General Cause No. 29321 was held during the week of September 3, 1985. Dr. Fish testified on behalf of Oklahoma Corporation Commission Staff in that hearing to prescribe rates, with regard to appropriate rates and charges for SWBT and implementation of an optional inside wiring maintenance service which he recommended become effective after a final order in FCC Docket No. CC-79-105. The Commission further finds that the FCC final order in FCC Docket No. CC 79-105 was not released until February 24, 1986, six (6) months after the hearing in Cause No. 29321.

The Commission further finds that the FCC did not transfer ownership of inside wiring pursuant to its Memorandum Opinion and Order of November 21, 1986, in CC Docket No. 79-105. In fact, on reconsideration, the FCC reversed from its previous requirement that telephone companies relinquish ownership of inside wiring and instead ordered that telephone companies simply be precluded from using ownership as a basis for denying a customer the opportunity to choose some entity other than the telephone company for installation and maintenance of inside wiring. This latter mandate accomplished the goals and objectives of the FCC to promote competition for installation and maintenance of inside wiring without interfering with private property rights.

The Commission further finds that its previously issued policy for regulatory treatment of inside wiring in Order No. 306994 issued in Cause No. PUD 860000238 is consistent with the FCC's policy and is in the public interest. The FCC sought to achieve public benefits by adopting policies which would encourage competition to occur in the installation and maintenance of inside wiring. In fact, the FCC's objectives to encourage competition were so strong that they preempted the states from adopting dissimilar policies. This Commission concurred in FCC's intent to promote competition for inside wiring. Hence, the Commission finds that Commission Order No. 306994 adopted consistent regulatory treatment for detariffing of inside wiring the state level and that such treatment is in the public interest.

The Commission further finds that ownership of inside wiring has never transferred from the telephone company. The Commission, in Order No. 306994 in Cause

No. PUD 860000238, precluded telephone companies from using a claim of ownership as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. This requirement mirrors the FCC's mandate and achieves both the FCC's objective to encourage competition for inside wiring and its objective to achieve consistent treatment on both the state and federal level.

Further, the Commission finds that SWBT's General Exchange Tariff provides that the simple inside wiring on its subscribers' premises which is furnished by the Company has remained the property of SWBT. OAC 165:55-5-1 of the Telephone Rules specifically prohibits any deviation from a company's filed tariff as to not only rates and charges; but, also as to the terms and conditions of services, and all tariff provisions are binding on SWBT and its customers. "Under Oklahoma law, tariffs required to be filed with a regulatory body are more than merely the terms of contract between the regulated utility and its customers; they are law." *Teleco, Inc. Southwestern Bell Tel. Co.* 511 F.2d 949 (10th Cir. 1975). The Commission finds no record of a transfer of ownership of the inside wire from SWBT to property owners.

The Commission finds no merit in Applicants' allegation that they have been deprived of due process on the basis of being deprived of life, liberty or property; nor does this Commission find merit in their statement that they have been damaged or are entitled to just compensation. The Applicants have not identified harm that they have incurred nor what property of Applicants, if any was taken. Moreover, Applicants have never pled nor

asserted that they have had or are having any problems with the wiring.

The Commission finds that the Applicants have no standing to bring these claims. "The proper inquiry concerning standing is whether the plaintiff has in fact suffered injury to a legally protected interest as contemplated by statutory or constitutional provisions." *Independent School Dist. No. 9 v. Glass*, 639 P.2d 1233 (Okla. 1982) at 1237.

The Commission further finds that the Report of the Administrative Law Judge containing the ALJ's findings and recommendations are fair and reasonable and that such report should be adopted by the Commission. Said report is attached hereto as "Attachment A" and incorporated herein by reference.

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION of the State of Oklahoma that the above findings of the Commission contained herein and the Report of the Administrative law Judge including the ALJ's findings and recommendations contained therein, attached hereto as "Attachment A" and incorporated herein by reference, are hereby expressly adopted by the Commission as findings of fact and conclusions of law.

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION of the State of Oklahoma that the Report of the Administrative Law Judge is adopted and the Applicants' cause is hereby dismissed with prejudice.

OKLAHOMA CORPORATION
COMMISSION

/s/ *J. C. Watts, Jr.*
J. C. WATTS, JR., Chairman

/s/ *Cody L. Graves*
CODY L. GRAVES, Vice Chairman

/s/ *Bob Anthony*
BOB ANTHONY, Commissioner

DONE AND PERFORMED THIS 9th day December, 1994, BY ORDER OF THE COMMISSION:

/s/ *Charlotte W. Flanagan*
CHARLOTTE W. FLANAGAN,
Secretary

"Attachment A"

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION: MARGARET B. FENT and JERRY R. FENT, WIFE AND HUSBAND	)	CAUSE NO. PUD 940000292
RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 292337, IN CAUSE PUD NO. 29321, (OR ANY OTHER ORDER, REGULATION OR RULE) AS VOID AS TO COMMISSION'S LACK OF JURISDICTION OVER PRIVATE PARTIES, SUBJECT MATTER OR POWER TO TRANSFER OWNERSHIP OF SOUTHWESTERN BELL TELEPHONE COMPANY'S "SIMPLE INSIDE WIRING" TO PRIVATE PARTIES WITHOUT DUE PROCESS, EQUAL PROTECTION OF LAWS AND JUST COMPENSATION	)	

HEARING — February 10, 1994 before Robert E. Goldfield Administrative Law Judge Further Proceedings in the Cause by Briefing Schedule set forth by the terms of Oklahoma Corporation Commission Order No. 380250 as amended by Order No. 380632

APPEARANCES: Russell Fister and Jerry R. Fent, Attorneys for Margaret B. Fent and Jerry R. Fent
Roger K. Toppins, Robert Gryzmala and Jonathan Royston Attorneys, Southwestern Bell Telephone Company
Rick B. Chamberlain, Assistant Attorney General Office of the Attorney General, State of Oklahoma
Deborah Jacobson, Assistant General Counsel Public Utility Division, Oklahoma Corporation Commission

REPORT OF THE ADMINISTRATIVE LAW JUDGE

(Filed July 21, 1994)

This cause came on for hearing before the undersigned Administrative Law Judge (ALJ) on the above shown date pursuant to assignment and after due and proper notice as ordered by the Oklahoma Corporation Commission (OCC).

INTRODUCTION

On January 26, 1994 the applicants, Margaret B. Fent and Jerry R. Fent, wife and husband, filed the application in this cause contesting jurisdiction of the OCC's orders, regulations or rules as void as to the subject matter and power over private parties to any forced transfer of ownership of Southwestern Bell Telephone Company's (SWBT) "simple inside wiring" to private parties without due process, equal protection of laws and just compensation. Applicant further filed a Motion for an Emergency

Hearing on the same date and such emergency hearing was set for hearing before the ALJ on February 10, 1994. OCC Order No. 380250, issued on February 11, 1994, denied the application for emergency hearing and found specifically " . . . that such issue should be considered carefully and judiciously rather than through a hurried-up emergency hearing process. . . . " Further, the ALJ recommended and the OCC granted the setting of a briefing schedule to be utilized to set forth the legal issues involved in this cause.

FINDINGS

The applicants allege that they are in possession of certain described real estate located in Oklahoma City, Oklahoma and that SWBT owned and maintained the "simple inside wiring" that goes through the walls, basement and attic of applicant's private home to telephones while being outside of any existing public easement, public dedication or public right-of-way. Such SWBT easement was a condition for applicant receiving SWBT's service by an "adhesion relationship."

The applicant states that several Federal Communications Commission (FCC) orders over the years, since 1974, directed the eight "Bell" companies to use a ten-year deprivation schedule for the purposes of depreciation of the "simple inside wiring" before transferring its ownership to applicant and other phone company customers.

Applicant further states that on January 29, 1986 the OCC issued Order No. 292337, in Cause No. 29321,

wherein the OCC adopted SWBT's optional wire maintenance plan which removed the cost of "simple inside wiring" from the general body of ratepayers after amortization of SWBT's wiring, and passed the ownership of the "simple inside wiring" to its customers. The order was appealed to the Oklahoma Supreme Court and is cited as *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309 (Okl. 1988) wherein the Court issued a mandate on April 6, 1989. Applicant alleges that the OCC Order No. 292337 attempted to pass SWBT's ownership of "simple inside wiring" to its customers, i.e., private parties with private property by governmental legislative order, without just compensation.

Applicant alleges that OCC Order No. 292337 is void on its face because the order fails to show personal service jurisdiction over the private rights of millions of property owners the order attempts to affect in the State of Oklahoma. It is applicant's contention that service by publication for the above legislative rate hearing did not satisfy the constitutional "due process" or "equal protection of laws" requirements involving "individual or property" rights. Further, applicant states that OCC Order No. 292337 is "void" because on the face of the OCC order the OCC failed to show "subject matter" or "power" jurisdiction over private property acts and cites cases that applicant believes would hold that OCC orders and rules can be attacked where the order or rule is facially "void" when the face of the record reveals that at least one of the three jurisdictional elements are absent, those elements being "parties," "subject matter" or "power."

Further, applicant states that it just discovered the OCC's and SWBT's illegal attempt to transfer the ownership of SWBT's "simple inside wiring" and that such action by the OCC and SWBT resulted in the dumping of ownership of the "simple inside wiring" upon applicant's real property and such dumping constituted a continuous, wrongful possession.

Applicant further states that as a result of OCC Order No. 292337, SWBT caused to be installed upon the outside of each residential home a "telephone network interface box" which established control of a new governmental defined point whereas SWBT's responsibility, liability and ownership of the telephone wiring stopped and the "simple inside wiring" started. Such OCC order changed responsibility, liability and ownership of "simple inside wiring" located upon private property without the consent of the homeowner or jurisdiction or authority over the private homeowner. Further, in OCC Order No. 292337 the OCC approved optimal plans which require each individual property owner of a home to own and maintain the repair costs of this "simple inside wiring" and placed the requirement on the private property owner to choose the plan under which it wished to abide by.

In addition, applicant states that access and possession throughout a private property's basement, walls and attic by SWBT's "simple inside wiring," includes one of the applicant's "bundle" of property rights provided for by the Oklahoma Statutes. That "bundle" of property rights includes the possession and the exclusive use of it as to others, real property, land, fixtures, appurtenances, and personal property. Applicant states that the statutory

definitions of these property rights show that the exclusive transportation of telephone messages through SWBT's "simple inside wiring" within applicant's home involves a property right. Applicant cites several sections of the United States Constitution and the Oklahoma Constitution which protect applicant's basic fundamental private property rights, restricts the State from depriving any person of life, liberty or property without due process of law and also prohibits the State from taking or damaging private property for public use without just compensation of any private property. Further, applicant states that only the District Courts in the State of Oklahoma have "personal" or "subject" matter jurisdiction over individual private disputes involving responsibility, liability or ownership of real property or personal property located upon private property, and that such State District Court have the jurisdiction of all questions of title or transfer of title to property by authority of Art VII, § 7 of the Oklahoma Constitution.

SWBT, in its responsive brief, moved for the dismissal of the application pursuant to Rule 165:5-9-2 of the Codified Rules of Practice of the OCC. SWBT states that the fundamental premise underlying the application is that the OCC has transferred the ownership of the "simple inside wiring" within the applicant's home, from SWBT, to the applicant. SWBT states that such premise is completely and unequivocally refuted by SWBT's General Exchange Tariff. SWBT further states that even though the provisions of its tariff have changed from time-to-time, the "simple inside wring" on its subscribers' premises which are furnished by the Company have remained the property of the Company. OAC 165:55-5-1 of the

OCC's Telephone Rules specifically prohibit any deviation from a company's filed tariff as to not only rates and charges; but, also as to the terms and conditions of services, and all tariff provisions are binding on SWBT and the customers. Even though the applicant cites several OCC and FCC decisions, and federal and state statutes and constitutional provisions, the provisions of the OCC's telephone rules and SWBT's tariffs are law. The federal Court has determined that tariffs filed in Oklahoma are not merely terms of contract but that they are the law. SWBT further states than neither the wording in OCC Order No. 292337 that the applicant refers to, or any FCC or OCC order, federal or state, has altered the ownership provisions of SWBT's General Exchange Tariff or its binding effects upon both SWBT and the applicant. Further, SWBT quotes from several FCC decisions which refused to determine the issue of the ownership of "simple inside wiring"; but, instead, restricted companies from using a claim of ownership to deny subscribers the right to remove, replace, rearrange or maintain "simple inside wiring" on their premises. Further, the FCC precluded telephone companies from requiring customers to purchase "simple inside wiring" and from charging customers for the use of the "simple inside wiring." A great amount of confusion was caused by several of the FCC's decisions in their attempts to draw distinctions between relinquishing claims of ownership and not using a claim of ownership. Following the issuance of the FCC and OCC orders the OCC issued orders amending its rules relating to "simple inside wiring" and approving SWBT tariff changes related to "simple inside wiring." In none

of these orders has the OCC attempted to transfer ownership of SWBT's "simple inside wiring" to the subscriber.

On May 19, 1988 in Cause No. 28547, the OCC issued Order No. 326295 which provided for several changes to the OCC Rules and Regulations Governing and Regulating the Operation of Telephone Companies. Most of these rule changes were the result of the deregulation of "simple inside wiring." A new Rule 15 was added setting up the "location of demarcation points and network interfaces." No part of the new rules attempted to transfer ownership of the telephone-company-installed inside wire. In fact, SWBT's General Exchange Tariff which provides that SWBT-installed wire is the property of SWBT, was not changed by this rulemaking. Furthermore, on August 6, 1992 the OCC approved SWBT-proposed changes to the demarcation provisions of SWBT's General Exchange Tariff by Order No. 367459 issued in Cause No. PUD 001318 and, again, no change was made in the ownership provisions of the tariff. Further, all SWBT customers were provided notice in November, 1986 that recent rulings called for customers to become responsible for the installation and repair of telephone wiring and jacks inside their home or business, but no mention was made of any transfer of ownership.

SWBT also states it has not been alleged that SWBT has an obligation to maintain the wiring and that even if it was alleged that it was to maintain the wiring, the applicant has not alleged any problem with the wiring or asserted that the applicant or anyone else has suffered injury or damage to their person or property in any way. Further, the provisions of SWBT's General Exchange Tariff, which have the force and effect of law, holds harmless

the telephone company against claims, losses or suits for injury or damage resulting from the telephone company's equipment located on the customer's premises. The tariff further provides: " . . . Inside Wire . . . the installation and maintenance of inside wire on the customer's side of the demarcation point is the responsibility of the customer. . . . "

And, finally, the Supreme Court in its review of OCC Order No. 292337 in *Turpin v. Oklahoma Corporation Commission*, 765 P.2d 1309 (Okl. 1986), held that Commission orders automatically became final after 30 days and therefore once the order becomes final, it is beyond the agency's power to vacate.

The OCC Staff joined in SWBT's Motion to Dismiss stating that the applicant has requested action by the OCC that is outside the OCC's authority to consider and has failed to timely bring its application. Further, the applicant has erroneously contended that there was a transfer of the ownership of "simple inside wiring" from SWBT to its customers when, in fact, OCC Order No. 292337 issued in Cause No. 29321 established a tariffed rate for an optional plan for the maintenance of "simple inside wiring."

The OCC Staff further contends that the applicant has, by its own admission, known of OCC Order No. 292337 since 1992. Further, the order has been in effect since 1986. The applicant stated in his filing of February 7, 1994 in this cause, that he first realized the effect of OCC Order No. 292337 some time in 1992, and the applicant further made such admission in open court during the request for emergency hearing. In *Turpen v. Oklahoma*

Corporation Commission, 769 P.2d 1309, 1318 (Okl. 1986), it was determined by the Oklahoma Supreme Court that all OCC orders automatically become final after 30 days and that once the order has become final, its vacation is beyond the agency's power.

The OCC Staff further failed to find a basis for a due process argument on behalf of the applicant or for any necessity for personal service in that cause as there had been no taking or showing of a taking of any of applicant's property. Further, as a precondition to providing service, applicant granted SWBT an easement on its property for SWBT to place its wiring, which is necessary for SWBT to be able to provide the applicant's service.

The OCC has full authority to establish rules and regulations regulating the provision of a utility service on private property which impacts rate payers. The purpose of Cause No. 29321, wherein OCC Order No. 292337 was issued, was to establish local rates and charges by SWBT. In the context of that rate hearing, the OCC approved a new optional service offering of SWBT but never transferred title to the existing "simple inside wiring" and therefore no constitutional harm exists to the applicant. The OCC Staff further noted that the notice for the hearing in Cause No. 29321 regarding the demarcation order was sufficient as not only was there notification published pursuant to the provisions of OAC 165:5-7-51, but the OCC directive regarding notice to SWBT customers also required that notice be sent by SWBT to each billing address and SWBT complied with the OCC's directive regarding notice due its customers.

FINDINGS OF FACT AND CONCLUSION OF LAW

The Administrative Law Judge, having considered the legal arguments presented in this cause, finds that the OCC has the authority to set rates through the hearing process and to produce orders such as Order No. 292337 that was issued in Cause No. 29321, of which the applicant complains. In addition, the OCC has the authority to approve telecommunications services and set the requirements or provisions of those services whether by tariff, contract or otherwise. And in the same respect, the OCC has the authority to deregulate tariff communications service offerings. In certain instances the OCC is preempted by the FCC from setting policy, but in this case the OCC complied with the FCC mandates as they occurred, as in FCC 79-105, and applied intrastate jurisdiction. To further the consistency, the OCC adopted a policy deregulating the maintenance of "simple inside wiring." The final result of deregulation is that the end user, the applicant in this cause, must pay for its own maintenance repair. The OCC never transferred ownership of the "simple inside wiring" to any subscriber of SWBT. It simply provided for the ability of the end user to install its own wire, regardless of whether it was a property owner, in the same manner that a property owner may have its own electrical service installed by the repairman of their choice. "Simple inside wiring" is a part of the ratemaking process as all regulations of telephone companies fall under OCC jurisdiction. In the past, the cost of all "simple inside wiring" was located in the rate base. The OCC has jurisdiction to remove such costs from the general rate base.

The ALJ can find no basis for a complaint that the applicant in this cause has been deprived of any property which would trigger a due process argument. Due and proper notice was provided SWBT's customers in accordance with the provisions of OAC 165:5-7-51 by publication and, in addition, by a mailing to each of SWBT's customers' addresses. Such notice complied with OCC directives regarding notice to SWBT's customers and by receiving such notice, all customers were placed on notice that the OCC was considering SWBT's rates and the requirements for provision of service being provided its customers through its rates.

And, finally, it should be noted that the ALJ finds that the most compelling argument for granting the Motion to Dismiss in this cause is that OCC Order No. 292337, issued in Cause No. 29321, has been in effect since 1986 and the applicants themselves have stated in this cause that they have known of the order since 1992. In *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309, 1318 (Okl. 1986), the Oklahoma Supreme Court stated that OCC orders automatically become final after 30 days and that after such 30-day period, it is beyond the agency's power to vacate such orders. Applicant made no proper motion to reconsider such prior order and it is well beyond the 30 days' allowable to request this Court to vacate its orders. Therefore, the ALJ recommends that this cause be dismissed with prejudice.

RESPECTFULLY submitted this
21st day of July, 1994.

/s/ *Robert E. Goldfield*
ROBERT E. GOLDFIELD
Administrative Law Judge

APPENDIX D

(47466)

NOTICE AND ORDER SETTING CAUSE FOR HEARING

Cause No. 29,321

Before the Corporation Commission of the State of Oklahoma.

In the Matter of the Application of Southwestern Bell Telephone Company for an order authorizing (1) interim intrastate rate relief, (2) permanent intrastate rates, charges, services and practices necessary to achieve an increase in rate of return and (3) intrastate access charges and tariffs.

STATE OF OKLAHOMA TO: Southwestern Bell Telephone Company and all interested parties.

* * * .

IT IS FURTHER ORDERED that Applicant shall cause this Notice and Order to be published once each week (for two consecutive weeks in a newspaper of general circulation published in each county in the State of Oklahoma and to be sent by mail or personally delivered to the chief executive officer of each incorporated city or town affected by Southwestern Bell Telephone Company's Application herein. The aforesaid publication and notice shall be completed not less than ten (10) days prior to the hearing in this Cause and shall be at Applicant's expense. Proof of publication and affidavits of mailing or delivery shall be filed with the Commission's Secretary to become a part of the record herein.

* * * .

DONE AND PERFORMED this 20th day of November, 1984.

APPENDIX E

Statistics of Communications Common Carriers,
Telephone Development by States

State	Percent of Households with Telephone Service	
	March 1987	March 1988
United States	92.5	92.9
Alabama	87.2	88.4
Alaska	88.3	87.2
Arizona	89.1	90.5
Arkansas	87.0	83.6
California	94.3	94.7
Colorado	93.2	95.1
Connecticut	97.9	96.5
Delware	96.5	97.2
District of Columbia	91.2	93.3
Florida	91.2	93.0
Georgia	87.5	91.5
Hawaii	94.8	95.3
Idaho	90.9	92.9
Illinois	94.0	94.3
Indiana	91.3	91.4
Iowa	95.5	94.5
Kansas	95.5	95.3
Kentucky	87.4	89.5
Louisiana	86.9	86.8
Maine	94.2	94.3
Maryland	96.2	96.4
Massachusetts	96.7	97.3
Michigan	94.1	94.4
Minnesota	95.8	97.3
Mississippi	82.6	83.8
Missouri	91.5	93.0
Montana	91.4	91.4

Nebraska	95.0	96.4
Nevada	92.1	91.8
New Hampshire	94.0	96.5
New Jersey	94.3	94.3
New Mexico	89.1	85.9
New York	93.3	93.0
North Carolina	89.7	90.1
North Dakota	97.8	96.7
Ohio	93.4	94.0
Oklahoma	88.5	89.6
Oregon	91.1	89.4
Pennsylvania	96.0	96.1
Rhoda Island	95.1	95.4
South Carolina	89.0	88.3
South Dakota	92.2	92.2
Tennessee	89.3	91.7
Texas	90.4	87.8
Utah	93.2	93.0
Vermont	95.8	95.9
Virginia	92.9	94.7
Washington	93.2	93.4
West Virginia	88.7	87.9
Wisconsin	96.2	95.9
Wyoming	93.3	93.6

Source: Federal Communications Commission.

Supreme Court, U.S.
FILED
JUL 12 1996
CLERK

(2)

No. 95-2012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARGARET B. FENT AND JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, OKLAHOMA CORPORATION COMMISSION AND STATE OF OKLAHOMA,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Supreme Court

JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROGER K. TOPPINS
Counsel of Record
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Central
800 North Harvey
Oklahoma City, OK 73102
(405) 291-6751

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Counsel for Southwestern Bell Telephone Company

LAWRENCE R. EDMISON
Counsel of Record
MARIBETH D. SNAPP
RACHEL LAWRENCE MOR
OKLAHOMA CORPORATION COMMISSION
Jim Thorpe Building
Oklahoma City, OK 73105
(405) 521-2255

Counsel for Oklahoma Corporation Commission

July 12, 1996

18 pp

QUESTION PRESENTED

Whether the Oklahoma Court of Appeals Division 2 correctly held, under Oklahoma law, that an order of the Oklahoma Corporation Commission establishing rates and charges for telephone service was not voidable in its entirety on account of alleged constitutional deficiencies in an "unconnected and independent" seven-word provision addressing ownership rights in telephone wiring inside Oklahoma homes and businesses.

RULE 29.6 STATEMENT

Respondent Southwestern Bell Telephone Company is a wholly-owned subsidiary of SBC Communications, Inc. SBC Communications, Inc. has no subsidiaries with securities in the hands of the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

COUNTERSTATEMENT OF THE CASE 3

A. Rejection of the Fents' Claims by the Oklahoma Corporation Commission 4

B. Rejection of the Fents' Claims on Judicial Review 6

REASONS FOR DENYING THE WRIT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	Page(s)
City of New York v. Federal Communications Comm'n, 486 U.S. 57 (1988)	9
City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985)	10
Ethics Comm'n v. Cullison, 850 P.2d 1069 (Okla. 1993)	7
Fent v. Southwestern Bell Tel. Co. et al., No. 84,815 (Okla. Mar. 20, 1996)	7
Fent v. Southwestern Bell Tel. Co. et al., No. 84,815 (Okla. Ct. App. Oct. 17, 1995)	6, 7
Independent School Dist. No. 9 v. Glass, 639 P.2d 1233 (Okla. 1982)	4, 9
Michigan v. Long, 463 U.S. 1032 (1983)	7
Norfolk & Western Ry. v. Hiles, 116 S.Ct. 890 (1996)	10
Rodgers v. Lodge, 458 U.S. 613 (1982)	7, 8
Teleco, Inc. v. Southwestern Bell Tel. Co., 511 F.2d 949 (10th Cir. 1975)	6
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	8

Turpen v. Oklahoma Corp. Comm'n,
769 P.2d 1309 (Okla. 1989) 3, 4, 9

Statutes

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1346(a)(2) 9

28 U.S.C. § 1491(a)(1) 9

Okla. Const art. IX § 20 6

Okla. Const. art. II § 23 4

Okla. Stat. tit. 75 § 11a (1991) 2, 7

Regulations

In re Application of Margaret and Jerry Fent,
OCC Order No. 388589 (Dec. 9, 1994) ..... *passim*

Memorandum Opinion and Order on Reconsideration, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring,
CC Docket No. 79-105 (Nov. 21, 1986) 5

Second Report and Order, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring,
CC Docket 79-105 (Feb. 24, 1986) 5

Miscellaneous

Application of Margaret and Jerry Fent,
OCC Cause No. PUD 94-292
(Jan. 26, 1994) 3, 4

Rules and Regulations Applying to
All Customers' Contracts 6

No. 95-2012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARGARET B. FENT AND JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, OKLAHOMA CORPORATION COMMISSION AND STATE OF OKLAHOMA,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Supreme Court

JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners seek to beguile this Court into reviewing a decade-old ratemaking order of the Oklahoma Corporation Commission ("OCC" or "Commission"), ostensibly on account of violations of the Due Process and Takings Clauses of the federal Constitution. The novel claim presented is that OCC orders *granting* Margaret and Jerry Fent certain limited rights in the telephone wiring inside their home somehow *deprived* them of property within the meaning of the Due Process Clause or *took* property in violation of the Takings Clause. These claims were rejected below on numerous state-law grounds by both the OCC (to which the Fents' claims were first presented)

and a reviewing state court, with the Oklahoma Supreme Court declining review altogether. Review by this Court is clearly unwarranted.

JURISDICTION

Petitioners invoke 28 U.S.C. § 1257(a) as the basis for this Court's jurisdiction to review the decision of the Oklahoma Court of Appeals. As explained below, there is a substantial issue as to whether jurisdiction is available under § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provisions and statutes identified in the petition, Okla. Stat tit. 75 § 11a is also relevant. In pertinent part, it provides:

§ 11a. Construction of statutes—Severability. In the construction of the statutes of this state, the following rules shall be observed: ....

(2) For acts enacted prior to July 1, 1989, whether or not such acts were enacted with an express provision for severability, it is the intent of the Oklahoma Legislature that the act or any portion of the act or application of the act shall be severable unless:

(a) the construction of the provisions or application of the act would be inconsistent with the manifest intent of the Legislature;

(b) the court finds the valid provisions of the act are so essentially and inseparably connected with and so dependent upon the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

(c) the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

COUNTERSTATEMENT OF THE CASE

On January 26, 1994, Jerry Fent, an Oklahoma City lawyer and self-styled consumer advocate, filed an application on behalf of himself and his wife asking the Oklahoma Corporation Commission to "void" OCC order No. 292337, 74 PUR 4th 624 (Jan. 1986) (the "Ratemaking Order").

The Ratemaking Order had issued long before—on January 29, 1986—and had been reviewed by the Oklahoma Supreme Court in *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309 (Okla. 1989). The Ratemaking Order approved rate increases for Southwestern Bell Telephone Company ("SWBT"), the regulated provider of telephone service to the Oklahoma City area, that, according to the OCC, produced a significant "annual increase in SWBT's intrastate earnings." *In re Application of Margaret and Jerry Fent*, OCC Order No. 388589 (Dec. 9, 1994) ("Commission Decision"), Petition at C-3.

In accordance with a federal deregulatory initiative then under way at the Federal Communications Commission, the Ratemaking Order also, as a subsidiary matter, authorized SWBT to take preliminary steps toward offering customers "optional" inside-wire maintenance service. *Id.* Because of this offering, customers were able for the first time to choose between purchasing inside-wire maintenance from SWBT (at prices set in the marketplace); purchasing such service from third parties; or maintaining the wiring inside their homes and businesses themselves. Maintenance of customer wiring had previously been the exclusive responsibility of SWBT, the owner of the wiring.

The Fents' application sought vacatur of the OCC Ratemaking Order in its entirety because of alleged violations of the Oklahoma and federal constitutions. The only federal claim squarely presented was the contention that the order violated due process by transferring ownership of the wiring in the Fents' home from Southwestern Bell to the Fents without prior notice by "personal service." *Application of Margaret*

and Jerry Fent, OCC Cause No. PUD 94-292 at 7 (filed Jan. 26, 1994) ("Fent Application"). In addition, the Fents also raised takings claims, but cited for support only the Takings Clause of the Oklahoma Constitution. *See* Okla. Const. art. II § 23; *see also, e.g.*, Fent Application at 10, 12, 14. According to the Fents, the lack of a "'separability clause' or 'saving clause'" in the Ratemaking Order rendered it "totally void" on account of these purported deficiencies. *Id.* at 9.

A. Rejection of the Fents' Claims by the Oklahoma Corporation Commission

The Oklahoma Corporation Commission rejected all of the Fents' claims on three separate state-law grounds. *First*, the Commission found that the Fents' claims were time-barred under Oklahoma law. According to the Commission, the order "of which Applicants complain" became "final and unappealable thirty days after January 29, 1986;" hence, granting vacatur was "beyond the agency's power." Commission Decision, Petition at C-6 (*citing Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309, 1318 (Okla. 1989)).

Second, the Commission found that the Fents lacked standing to bring their claims before the Commission because they had not "in fact suffered injury." Commission Decision, Petition at C-10 (*citing Independent School Dist. No. 9 v. Glass*, 639 P.2d 1233, 1237 (Okla. 1982)). The Commission noted in this connection that the Fents "never pled nor asserted that they have had or are having any problems with the wiring." *Id.* at C-9 - C-10.

Third, the Commission also found, contrary to the premise of the Fents' due process and takings claims, that the "simple inside wiring on its subscribers' premises ... has remained the property" of SWBT. Commission Decision, Petition at C-9. Here the Commission discussed the FCC's role in determining who owned inside wiring after deregulation of wire-maintenance service. It concluded that, while positions taken by the FCC in a rulemaking addressing wiring ownership had evolved, the FCC had clearly settled on recognizing the

retention of ownership by telephone companies. *Id.* at C-8. The OCC found its own policy "consistent with the FCC's policy" resulting from this rulemaking. *Id.*

In essence, the OCC found that the language in the Ratemaking Order cited by the Fents as transferring title to the wiring in their home was, at best, an interim position. On January 29, 1986, when the Ratemaking Order issued, an FCC rulemaking *proposal* indeed called for transferring wiring ownership from telephone companies to private persons, and the OCC's Ratemaking Order partly reflected this pending proposal.[1] But the very next month, the FCC's final rule changed course by calling for abandonment of the companies' claims to inside wiring without specifying who (if anyone) would come to own it.[2] And even more important, upon reconsideration in November 1986, the FCC ultimately settled on retention of telephone-company ownership, along with regulatory oversight to ensure that companies did not misuse their property rights to stifle competition for provision of wiring installation and maintenance.[3]

Accordingly, it was the FCC's *final* policy—which recognized retention of title by telephone companies—that the

---

[1] *See Second Report and Order, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring* at 4, CC Docket 79-105 (Feb. 24, 1986) (noting that the FCC had proposed that "the ownership/title to inside wiring *should pass* to the customer and/or owner of the premises") (emphasis added).

[2] *Id.* at 24 (requiring that companies abandon claims to wiring, while leaving the question of *to whom* ownership should pass to be "resolved through the application of local property law").

[3] Commission Decision, Petition at C-8 (describing the FCC's *Memorandum Opinion and Order on Reconsideration, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105 (Nov. 21, 1986), as "revers[ing] its previous requirement that telephone companies relinquish ownership of inside wiring and instead order[ing] that [they] simply be precluded from using ownership as a basis for denying a customer the opportunity to choose" their provider of inside wiring installation and maintenance).

OCC ultimately followed. Hence, as the Commission Decision noted, the OCC conspicuously left in place a longstanding provision of SWBT's "General Exchange Tariff" (the company-specific, OCC document defining SWBT's relationship with its customers) stating that "[e]quipment, and lines on customers' premises, furnished by the telephone company, shall be and remain the property of the Telephone Company...." *See* Rules and Regulations Applying to All Customers' Contracts, Tab 28, Section 7.2C; *see also* Commission Decision, Petition at C-9 (relying on this provision); *cf. Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949, 952 (10th Cir. 1975) (Oklahoma regulatory tariffs carry force of law).

Based on this critical finding that "ownership of inside wiring has never transferred from the telephone company," the OCC rejected out of hand the Fents' due process and takings claims. Commission Decision, Petition at C-8. It noted simply that it found "no merit" in the Fents' claims that they had been "deprived of life, liberty or property" and that the Fents' had "not identified ... what property ... if any was taken." *Id.* at C-9. The OCC thereupon dismissed the Fents' application with prejudice. *Id* at C-10.

B. Rejection of the Fents' Claims on Judicial Review

Although the Fents initially sought review in the Oklahoma Supreme Court, *see* Okla. Const art. IX § 20, that court declined to hear the case, but instead transferred it to Oklahoma Court of Appeals Division No. 2. On October 17, 1995, a unanimous three-judge panel of the appellate court affirmed the OCC's dismissal of the Fent application.

Speaking for the court, Judge Boudreau reasoned that "the portion of the [Ratemaking Order] determining permanent rates stands unconnected and independent of the seven words in the order that allegedly transferred title [to] SWB's 'inside wiring.'" *Fent v. Southwestern Bell Tel. Co. et al.*, No. 84,815, mem. op. (Okla. Ct. App. Oct. 17, 1995) ("Appellate Decision"), Petition at A-6. Thus, the Court concluded that

"even if the alleged offending portion was constitutionally infirm," the "remainder of the order" would be "severable" and a "viable" enactment. Appellate Decision, Petition at A-7. On the basis of this appellate court opinion, the Oklahoma Supreme Court denied certiorari to consider the claims now presented to this Court. *Fent v. Southwestern Bell Tel. Co. et al.*, No. 84,815, mem. op. (Okla. Mar. 20, 1996), Petition at B-1.

REASONS FOR DENYING THE WRIT

As elaborated below, the reasons the Court should not grant the petition are both numerous and manifest.

First, the appellate court's state-law severability analysis provides an "adequate and independent" state-law ground of decision, foreclosing this Court's jurisdiction. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (granting review where "the same judgment would be rendered by the state court after [this Court had] corrected its view of federal laws" would constitute an improper "advisory opinion") (internal citation and quotation marks omitted). In making its severability finding, the appellate court relied on Okla. Stat. tit. 75 § 11a (1991) and the Oklahoma Supreme Court's application of that statute in *Ethics Comm'n v. Cullison*, 850 P.2d 1069, 1077 (Okla. 1993). *See* Appellate Decision, Petition at A-5. Because the Fents' claims would be barred by these state-law authorities regardless of how this Court might rule on the constitutional issues raised in the petition, this Court lacks jurisdiction to grant review.

Second, the appellate court's state-law severability analysis is not merely an "adequate and independent" state ground supporting the decision; it is the sole ground of decision. Because the Oklahoma Court of Appeals found it "unnecessary to address" the Fents' allegation that the Ratemaking Order "was void on ... constitutional grounds," *see* Appellate Decision, Petition at A-7, it never even passed on the Fents' federal claims. This fact, standing alone, is also sufficient reason to decline review. *See, e.g., Rodgers v.*

Lodge, 458 U.S. 613, 628 n.10 (1982) (holding that because challenge had not been "addressed" by the lower court the Supreme Court also would "not address it").

Third, even if this Court had jurisdiction to grant review there would be no warrant for exercising it. The Fents do not claim that the OCC and Oklahoma appellate court decisions create a split with other courts that have addressed similar claims. Indeed, far from pointing to a conflict between courts calling for resolution, the Fents concede that Oklahoma's decade-old inside-wire ownership regime has been duplicated, presumably without judicial objection, in "[v]irtually every State." Petition at 17. Until at least one state or federal court breaks this impressive unanimity, *see* Petition at 17-19, there is no need for this Court's involvement.

Fourth, the Fents' claims are obviously meritless. The only constitutional challenge squarely raised below is the claim that the Commission deprived the Fents of procedural due process by transferring property rights *to* them without prior notice by personal service. But the Fents' premise—that States may not make generally applicable legislation affecting property rights absent prior personal notice to those affected—is wrong even where persons are *deprived* of property. *See Texaco, Inc. v. Short*, 454 U.S. 516, 537 (1982) (Where State "has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner" the Due Process Clause does not require prior personal notice.) It follows *a fortiori* that no prior personal notice is required where, as here, no deprivation of any property interest has occurred.

Similarly, the Fents' oblique federal Takings claim is also frivolous. Not only was it not presented or passed on below, *see supra* at 3-4; *Rodgers v. Lodge*, 458 U.S. at 628 n.10, but also the FCC and OCC wiring orders, far from *taking* the Fents' property rights, actually augmented them. As the Commission noted, the Fents "never pled nor asserted that they

have had or are having any problems with the wiring." *Id.* at C-9 - C-10. The Fents thus never explained how their augmented control over Southwestern Bell's valuable and useful property could ever constitute a federal "taking."

Moreover, the Fents' takings claims are also asserted against the wrong sovereign. As noted above, it was the FCC—not the OCC—that drove the deregulation of inside wiring. *Cf. City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988) (FCC may preempt State and local regulation in conflict with FCC policy). Under these circumstances, claims for compensation arising from inside-wiring deregulation may be brought only against the federal government, in federal court, under the Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

Fifth, even if the appellate court had not disposed of the case on severability grounds, it would still have had to face the two other "adequate and independent" state jurisdictional grounds relied on by the OCC—the 30-day time bar and the Fents' lack of standing before the Commission. *See* Commission Decision, Petition at C-6, C-10. These Commission findings, like the appellate court's severability finding, rested exclusively on provisions of Oklahoma law (*federal* standing requirements obviously do not apply to the Commission), as authoritatively interpreted by the Oklahoma Supreme Court. *See* Commission Decision, Petition at C-6 (finding the Fents' claims time-barred under *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309, 1318 (Okla. 1989)); *id.* at C-10 (finding that the Fents lack standing under *Independent School Dist. No. 9 v. Glass*, 639 P.2d 1233, 1237 (Okla. 1982)). These findings are therefore two more bars to this Court's jurisdiction.

Sixth, even if the Fents could surmount all of the collateral obstacles to this Court's jurisdiction—severability, standing, the 30-day time-bar—such jurisdiction would still fail because of a predicate state-law finding on an essential element of the Fents' claims. In dismissing the Fents' constitutional

claims on the merits, the OCC expressly rejected those claims' critical premise—that the OCC's Ratemaking Order transferred an ownership interest in the Fents' inside telephone wiring. *See* Commission Decision, Petition at C-8. But the OCC's rejection of the transfer-of-ownership premise was not disturbed by the appellate court, and the Fents have not explained how this Court may set aside an authoritative OCC interpretation of *its own* order. That finding is therefore yet another adequate and independent state ground barring review.

Finally, the Oklahoma Supreme Court twice refused to address the very claims now brought to this Court. Because granting certiorari "represents a commitment of scarce judicial resources," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985), only on the rarest of occasions has this Court been willing to expend "scarce resources" where a state court of last resort has declined to do so. *See, e.g., Norfolk & Western Ry. v. Hiles*, 116 S.Ct. 890 (1996) (certiorari to the Appellate Court of Illinois, 5th Judicial District). This clearly is not such an occasion.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROGER K. TOPPINS
Counsel of Record
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Central
800 North Harvey
Oklahoma City, OK 73102
(405) 291-6751

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Counsel for Southwestern Bell Telephone Company

LAWRENCE R. EDMISON
Counsel of Record
MARIBETH D. SNAPP
RACHEL LAWRENCE MOR
OKLAHOMA CORPORATION COMMISSION
Jim Thorpe Building
Oklahoma City, OK 73105
(405) 521-2255

Counsel for Oklahoma Corporation Commission

Supreme Court, U. S.
FILED
JUL 22 1996
CLERK

No. 95-2012

In The

Supreme Court of the United States

October Term, 1995

MARGARET B. FENT and JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY;
OKLAHOMA CORPORATION COMMISSION and
STATE OF OKLAHOMA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

REPLY BRIEF TO JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

*James M. Little
Little & Morgan
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

Russell B. Fister
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543
Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether a state public utility commission may transfer a property interest to the utility's consumers without obtaining personam jurisdiction over consumers through minimum procedural due process notice.

II. Whether the Petitioners' property interest in their home was violated when the Oklahoma Corporation Commission approved the passing, relinquishing and precluding of Southwestern Bell Telephone Company's property interest in "inside wiring" to its customers without due process of law and just compensation?

III. Whether the property interests of over 92 million homes are affected by the deregulation and detariffing proceedings of governmental utility authorities in the 50 States by the forced transfer of local telephone company's "inside wiring" property interest to their customers without due process and just compensation is sufficient reason to grant this Writ of Certiorari?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

REPLY BRIEF TO JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

REPLY ARGUMENT 1

A. Where *all* parties admit and *all* documents show that an element (financial responsibility for maintenance costs) of Southwestern Bell Telephone Company's ("SWB") corporate property interests (inside wiring) was transferred to its individual customers, the question of whether formal "title" was or was not passed is a State non-issue for this federal question appeal 1

B. If this Court should hold that a transfer of an element of a property interest from SWB to Petitioners without their day in the Oklahoma Corporation Commission ("OCC") violated due process and is void, then the effects on all or the other parts of the OCC Order (severability) is a State non-issue for this federal question appeal 2

C. The State issues of (a) standing (rate payer and property holder) or (b) a time bar, were *not* discussed or used as a basis for the Oklahoma Court of Appeals decision and therefore cannot now be recreated or used by Respondents as a State issue for denial of the federal question appeal 3

D. Petitions' constitutional issues were raised, discussed and denied in the Oklahoma Court of Appeals decision 4

CONCLUSION 5

REPLY BRIEF TO JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Petitioners respectfully file their reply brief to the respondents' joint brief in opposition to petition for certiorari pursuant to Rule 15.6 of the Supreme Court of the United States.

The petitioner's reply brief will limit themselves "to new points raised in the brief in opposition" and to clarify any parts of the joint brief in opposition that either misstates the facts or the law, unfairly denigrate the importance of the questions presented, or add to or misstate the issues that would properly be before the Court if certiorari were granted. Rule 15.2.

REPLY ARGUMENT

A. Where *all* parties admit and *all* documents show that an element (financial responsibility for maintenance costs) of Southwestern Bell Telephone Company's ("SWB") corporate property interests (inside wiring) was transferred to its individual customers, the question of whether formal "title" was or was not passed is a State non-issue for this federal question appeal.

The Oklahoma Corporation Commissioner's Order at Petitioners' Appendix, page C-7 states:

> " * * * Order No. 292337, among other things, set rates and *approved* an optional inside wiring maintenance service. * * * ." (Emphasis supplied.)

The conflict between (a) OCC Order No. 292337 ordering the "passing of ownership" and (b) SWB's General Exchange Tariff showing ownership remaining the property of SWB is a State non-issue for this federal appeal.

That is, because all the documents and all the parties admit that the financial maintenance responsibility for SWB's inside wiring was transferred to its customers. Property is comprised of many elements. Financial responsibility for a property's maintenance is one of those elements. The question of whether formal "title" was or was not passed to customers is a State non-issue for this federal appeal.

Again, the real federal issue being the transfer of an element of property (maintenance of inside wiring) to utility's consumers without obtaining personam jurisdiction over consumers through minimum procedural due process notice.

B. If this Court should hold that a transfer of an element of a property interest from SWB to petitioners without their day in the Oklahoma Corporation Commission ("OCC") violated due process and is void, then the effects on all of the other parts of the OCC Order (severability) is a State non-issue for this federal question appeal.

The Petitioners attacked OCC Order No. 292337 because a part of the order established and required SWB customers to financially maintain SWB's inside wiring.

The question of whether all or a part of the OCC Order No. 292337 will be void if this court finds the ex

parte transfer of an element of a property interest violated the Due Process Clause was never raised in this Petition for Writ of Certiorari.

Respondents offered Okla. Stat. Tit. 75 § 11a, "Construction of statutes – Severability" and their counter "Question Presented" as an attempt to create a State issue for this federal question appeal. The Respondents proposed counter "Question Presented" is:

> "Whether the Oklahoma Court of Appeals Division 2 correctly held, under Oklahoma law, that an order of the Oklahoma Corporation Commission establishing rates and charges for telephone service was not *voidable in its entirety* on account of alleged constitutional deficiencies in an "unconnected and independent" seven-word provision addressing ownership rights in telephone wiring inside Oklahoma homes and businesses," (Emphasis supplied.)

If this court should hold that the transfer was void, then the governmental forced inside wiring maintenance program will be dead in this State and the other 49 States.

Again, the Respondents attempt to create a State issue for this federal question appeal.

C. The State issues of (a) standing (rate payer and property holder) or (b) a time bar, were not discussed or used as a basis for the Oklahoma Court of Appeals decision and therefore cannot now be recreated or used by Respondents as a State issue for denial of the federal question appeal.

The Oklahoma Court of Appeals opinion allowed Petitioners' attack on the OCC Order and did *not* discuss

or dismiss Petitioners' appeal on the basis of: (a) State issue of standing, (b) thirty day appeal requirement for parties to an action or (c) a lack of a property interest. See Petitioners' Appendix pages A1-A7. All of these State non-issues not in the Oklahoma Court of Appeals memorandum opinion cannot now be recreated for this federal question appeal.

D. Petitioners' constitutional issues were raised, discussed and denied in the Oklahoma Court of Appeals decision.

The Petitioners' federal constitutional challenges were dismissed in the OCC when it held:

> "The Commission finds no merit in Applicants' allegation that they have been deprived of due process on the basis of being deprived of * * * property; * * * ." Petitioners' Appendix, page C-9.

The Oklahoma Court of Appeals decision states:

> " * * * . They (Fents) challenged the order on jurisdictional and other constitutional grounds. * * * ." Petitioners' Appendix, page A-3.

And,

> " * * * . The Fents have alleged that OCC Order No. 292337 * * * in violation of a myriad of federal and state constitutional provisions. However, even if this court were to agree with the Fents that OCC Order No. 292337 attempted, unconstitutional, to * * * ." Petitioners' Appendix, page A-4.

The Oklahoma Court of Appeal's opinion reached the conclusion that even if the alleged offending portion (transferring financial maintenance responsibility) was constitutionally infirm, the remaining order would be viable legislation. Petitioners' Appendix, page A-7.

The dissenting opinion in the Supreme Court of Oklahoma preserved our issue by stating:

> " * * * whether the Oklahoma Corporation Commission may transfer property rights to the utility's consumers without obtaining in personam jurisdiction over the consumers through minimum procedural due process notice" Petitioners' Appendix, page B-1.

Therefore, Respondents' allegation that there is no federal question preserved in this appeal is false.

CONCLUSION

The Petitioners are *not* asking this court to answer State issues. For all the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set for a full hearing by the Court. In the alternative, *certiorari* should be granted and the decision below summarily reversed, sending the case back to the Supreme

Court of Oklahoma and its Court of Appeal of the State of Oklahoma, Division No. 2.

Respectfully submitted,

*James M. Little, OBA #5465
(Counsel of Record)
Little & Morgan
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

Russell B. Fister, OBA #2946
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543
Attorneys for Petitioners

*Counsel of Record